U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 18 January 2005

BALCA CASE No.: 2004-INA-52
ETA Case No.: P2002-CA-09518697/LA

In the Matter of:

VIKTOR BENES BAKERY #16,
Employer,

on behalf of

NORMA RODGRIGUEZ,
Alien.

Appearance: Moshe A. Young, Esquire
Studio City, California
For the Employer and the Alien

Certifying Officer: Martin Rios
San Francisco, California

Before: Burke, Chapman, and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. Viktor Benes Bakery #16 ("the Employer") filed an application for labor certification[1] on behalf of Norma Rodriguez ("the Alien") on March 19, 2001. (AF 40).[2] The Employer seeks to employ the Alien as a Shipping, Receiving and Traffic Clerk. This decision is based on the record upon which the Certifying Officer ("CO") denied certification and the Employer's request for review, as contained in the Appeal File. 20 C.F.R. § 656.27(c).

[1] Alien labor certification is governed by the Immigration and Nationality Act, 8 U.S.C. § 1182 (a)(5)(A) and 20 C.F.R. Part 656.

[2] In this decision, AF is an abbreviation for Appeal File.

STATEMENT OF THE CASE

On March 19, 2001, the Employer filed an application for labor certification to enable the Alien to fill the position of Shipping, Receiving, and Traffic Clerk. (AF 40-41). The Employer described the duties of the position as contacting vendors and shippers to ensure that merchandise, supplies and equipment are forwarded on specified shipping dates, communicating with transportation companies to preclude delays in transit, arranging for distribution of materials upon arrival to two locations, and contacting vendors to requisition materials. (AF 40). The Employer required a high school diploma and two years of experience in the job offered.

In the Notice of Findings ("NOF"), issued July 2, 2003, the CO found that the requirement of two years of experience was restrictive in light of the fact that the specific vocational preparation for this job opportunity is normally zero months up to, but not exceeding, three months. (AF 34-38). The CO stated that the Employer could either amend the restrictive requirement and retest the labor market or justify the requirement as based on business necessity. (AF 35). The CO also found that the Employer did not document lawful job-related reasons for rejecting four U.S. applicants who were qualified at the time of their initial consideration. (AF 36). The CO noted that the Employer's recruitment report did not indicate if the qualifications of the prospective workers were discussed and did not provide the date and time the telephone interviews took place. The CO directed the Employer to submit rebuttal which clearly documented how each U.S. worker was rejected solely for lawful, job-related reasons at the time of his initial consideration. The CO stated that the Employer should include the dates and time each applicant was interviewed, state whether the applicants were offered the position, and submit interview notes taken during the telephone conversation for each applicant to substantiate any assertions made. (AF 36-39).

The CO also found that the address in the advertisement was different from the advertisement in the posted notice. The CO directed the Employer to clarify where the work would be performed and amend the ETA 750A, if appropriate. (AF 37-38).

In its rebuttal, dated June 19, 2003, the Employer agreed to amend the experience requirement by reducing the two years to three months and to re-test the labor market with the revised requirement. An amendment letter signed by the Employer was included with the rebuttal statement. The rebuttal letter also stated that the four U.S. applicants declined the job for different reasons as set forth in the recruitment report and they were not rejected by the Employer. Finally, the Employer clarified that it is located in Sherman Oaks. (AF 23-33).

The CO issued the Final Determination ("FD") on August 22, 2003, denying the Employer's application for labor certification. (AF 21-22). The CO found that the Employer's amendment of the experience requirement and willingness to retest the labor market satisfied the first finding in the NOF. In addition, the CO found that the Employer clarified the job site and interview location. The CO, however, concluded that the Employer failed to satisfactorily rebut that U.S. workers were rejected for lawful, job-related reasons. The CO found that the Employer's unsupported assertion that the workers declined the job was not a lawful, job-related reason for their rejection. The CO noted that the NOF clearly required that the Employer include the dates and time each applicant was interviewed on the telephone and whether they were offered the position. Based on the Employer's failure to satisfactorily rebut the finding that the U.S. workers were rejected for unlawful reasons, the CO stated that "we are precluded from allowing the application to enter into a new recruitment phase even though employer has stated its willingness to retest the labor market." (AF 22).

By letter dated September 23, 2003, the Employer requested review by this Board (AF 1-20). The Employer argued that the four U.S. applicants were not available applicants because they were not willing. The Employer argued that the job did not need to be offered to applicants who had already stated they were no longer interested in the position and the Employer's contact of all the applicants was a clear demonstration that the Employer offered each applicant the position. In addition, the Employer stated that the applicants were interviewed as soon as the resumes were received. The resumes were

received on December 13, 2003 and the applicants were interviewed during the evening hours of December 18, 2003 between 8:00 and 10:00 p.m. (AF 1-20).

The case was docketed by the Board on January 21, 2004.

DISCUSSION

The Employer's willingness to retest the labor market was determined by the CO to be outweighed by the Employer's unlawful rejection of four qualified U.S. workers based on the Employer's failure to adequately document job-related reasons for rejecting four U.S. applicants.

In *Yaron Development Co., Inc.*, 1989-INA-178 (Apr. 19, 1991) (*en banc*), this Board outlined what elements are needed in a recruitment report to establish proper attempts to contact U.S. applicants. In general, the report must indicate what attempts the employer made to contact the applicants and include details such as: 1) when or how many times it attempted to contact the applicants by phone; 2) whether the attempted contacts were made to the applicants' place of business or homes; 3) with whom a message was left, if any, and what the message was; and 4) whether the employer attempted alternative means of communication. Although the Employer did not provide the date the telephone interviews were conducted, the Employer did state in the recruitment report dated January 16, 2002 that "we contacted all the applicants by phone as soon as we received the resumes and conducted telephone interviews." (AF 44). The CO accepted the Employer's statement about the date of the telephone interviews and the result of the telephone interviews for twelve of the U.S. applicants, but not for the four applicants listed in the NOF. Since the report included a general statement that the applicants were called as soon as the resumes were received and since this statement was accepted by the CO for twelve of the U.S. applicants, we do not find that omission of specific date of the telephone interviews is a basis in these circumstances for denying labor certification.

The CO also found fault with the recruitment report because the Employer did not state that the job was offered to the four named U.S. applicants. A bare assertion without either supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof. *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999)(*en banc*).

The statement by the Employer on rebuttal merely reiterated the Employer's incomplete recruitment report by re-stating that the four applicants were unavailable. The Employer stated that each of these applicants were told the details of the job (*i.e.*, salary, environment, requirements) and decided to stay in their current positions. The Employer stated that they were unwilling. The CO noted that there was no indication that the Employer offered the job to the applicants. In rebuttal, the Employer offered to contact the applicants again and offer them the chance to interview again. The CO dismissed this offer as untimely.

The employer bears the burden of proof to establish the lawful rejection of qualified U.S. workers. *Cathay Carpet Mill, Inc.*, 1987-INA-161 (Dec. 7, 1988)(*en banc*). An employer's undocumented assertion regarding the proffered reason for rejecting a qualified U.S. applicant is insufficient to carry this burden of proof. *Gemini Worldwide Cargo Corp.*, 1993-INA-230 (July 6, 1994). In this case, the Employer has made only bare assertions that the applicants were not interested in the position upon hearing the details of the job. The Employer did not offer the job to the applicants for them to reject. The Employer attempts to argue that the fact that the applicants were contacted for interviews indicates that they were offered the position. (AF 2). This argument is without merit, as the applicant must actually be offered the position, not merely invited for an interview.

This is particularly true with respect to the applicant whom the Employer stated was looking for a higher wage. An employer may reject an applicant as unwilling to accept the salary offered only after the position has been offered to the applicant at the salary listed. *Impell Corp.*, 1988-INA-298 (May 31, 1989)(*en banc*). An employer's belief that the applicant would not accept the job at a lower salary or the applicant's

statement that he is looking for a higher wage is not sufficient, unless the job is actually offered to the applicant and the applicant turns it down because the wage is too low. *Palacio Metal Works*, 1990-INA-396 (Mar. 27, 1991). In this case, the Employer stated that one applicant was seeking a higher wage and was therefore unwilling to accept the job. There is no indication, however, that the position was actually offered to the applicant and the applicant turned it down. The Employer has not demonstrated that it rejected qualified U.S. applicants solely for lawful, job-related reasons. As such, labor certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED.**

Entered at the direction of the Panel by:

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Todd R. Smyth
Secretary to the Board of Alien
Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs